United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-2021

To be argued by: Mitchell B. Dubick

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LYMAN T. SHEPARD,

Petitioner-Appellant,

v.

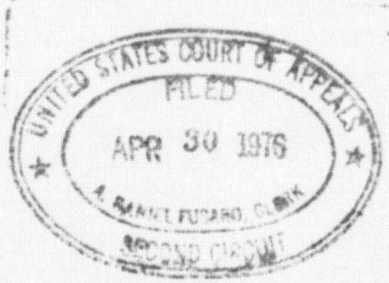
UNITED STATES BOARD OF PAROLE,

Respondent-Appellee.

B
P/S

On Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLEE



RICHARD L. THORNBURGH
Assistant Attorney General

GEORGE W. CALHOUN
MITCHELL B. DUBICK
Attorneys, Department of Justice
Washington, D.C. 20530

Attorneys for Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CONTINUED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-2021

LYMAN T. SHEPARD,

Petitioner-Appellant,

v.

UNITED STATES BOARD OF PAROLE,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

APPELLEE'S STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Due Process Clause requires the Parole Board to hold a parole revocation hearing before it can revoke the parole of a parolee convicted of an offense committed while on parole.

2. If such a hearing must be held, whether it can be deferred until the parolee has completed service of the sentence imposed for the intervening crime.

3. If the Due Process Clause requires the Parole Board to consider the parolee's status during the pendency of the intervening sentence, whether that review requires an in-person hearing.

4. If a prompt in-person hearing is required, whether a parolee is entitled to release from custody because of delay in holding the hearing.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Morrissey v. Brewer, 408 U.S. 472 (1972), the Supreme Court held that prior to revocation of parole for non-criminal violations, [1] the Due Process Clause requires 1) a "probable cause hearing" at or near the place of arrest; and 2) a fuller hearing, at which a final revocation decision is made. 408 U.S. at 485-489.

Although not directly faced with the question, the Court also addressed the situation in which the revocation is based upon the conviction of another crime. In that case, the Court noted "a parolee cannot relitigate issues determined against him in other forums." 408 U.S. at 490.

The Court's final instruction to the Eighth Circuit upon remand was to determine whether the petitioner had admitted the violations and whether those violations were reasonable grounds

---

[1] Morrissey was alleged to have bought a car under an assumed name, operated it without permission, obtained credit under an assumed name, given false information to police concerning a minor accident, and failed to report a place of residence. 408 U.S. at 473. Since no criminal charges were ever brought for any of these alleged violations that might have constituted offenses (e.g., giving false information to police), the charges can all be termed technical violations.

for revoking parole. If so, the Court wrote, "that would end the matter." Id.

Seemingly, this language would have resolved the question now before this Court, since petitioner's felony conviction is clearly a proven and reasonable ground for revoking parole. Since the Morrissey decision, however, nine Courts of Appeals have considered, and reached differing results, on the question of how -- and whether -- Morrissey applies to the situation of a parolee whose violation consists of a criminal offense for which he has been tried, convicted, and incarcerated. [2/] In addition, the issue is before the Supreme Court in Moody v. Daggett, No. 74-6632.

The government contends first that the existence of a valid conviction eliminates the need for any revocation hearing. If the

---

[2/] Orr v. Saxbe, No. 75-1042 (3d Cir. June 17, 1975), petition for cert. pending, No. 75-5594 (filed October 10, 1975), aff'g Civ. No. 74-341 (M.D. Pa. November 27, 1974), Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975), petition for cert. pending, No. 75-5215 (filed August 5, 1975). Cook v. United States Attorney General, 488 F.2d 667 (5th Cir. 1974), cert. denied, 419 U.S. 846 (1974); Colangelo v. United States Board of Parole, No. 75-1249 (6th Cir. July 16, 1975), aff'g Civ. No. C74-251 (N.D. Ohio December 11, 1974); United States ex rel Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975); Reese v. United States Board of Parole, No. 74-2418 (9th Cir. January 12, 1976); Small v. Brittan 500 F.2d 299 (10th Cir. 1974); Jones v. Johnston, No. 74-1517 (C.A. D.C. March 23, 1976). The decisions in the Seventh, Eighth, and District of Columbia Circuits held that a prompt hearing was required; the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits held that it could be deferred until the parolee was retaken for service of the violator term.

admission of a non-criminal violation "ends the matter", then surely a valid conviction is dispositive. Once it is ascertained that a criminal violation has occurred, no set of facts could entitle the parolee not to be revoked. Rather, all that remains is the exercise of the Board's discretion, and no hearing is required for that purpose.

Assuming arguendo that the Due Process Clause requires some type of review for a parolee convicted of a second offense, that review may properly be deferred until the parolee begins service of the remainder of the violator term. Prior to that point, there is no deprivation of a cognizable Fifth Amendment liberty or property interest that would entitle a parolee to the protections guaranteed by the Due Process Clause while incarcerated for the intervening offense.

Next, even if the Parole Board is constitutionally required to consider a parolee's status during his intervening term, the Board's prior regulation, 28 C.F.R. § 2.53, [3] which has been recently

---

[3] 28 C.F.R. § 2.53 provides as follows:

§ 2.53. Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where

(Continued on next page)

codified into statue, 18 U.S.C. § 4214(b), [4] provides sufficient procedural protection to comport with the Due Process

---

[3] (Continued from previous page)
the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

[4] Section 4214, enacted March 15, 1976 as part of the Parole Commission and Reorganization Act, [hereinafter "the Act"] will become effective May 15, 1976. Hence, at the time any mandate from this Court issues, the Act will be in effect. That section states in pertinent part:

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection(a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within 180 days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a) (2) (B) of this section to assist him in the preparation of such application.

(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall
(Continued on next page)

Clause. Indeed, were this Court to accept petitioner's contention that a full in-person hearing was necessary, at the earliest possible time [5] in every case, it would effectively be declaring the new Act

---

[4] (Continued from previous page)
have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

(3) Following the disposition review, the Commission may:

(A) let the detainer stand; or

(B) withdraw the detainer.

(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

(1) restore the parolee to supervision;

(2) reprimand the parolee;

(3) modify the parolee's conditions of the parole;

(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

[5] Appellant's Brief [hereinafter Br.] at 12-15.

unconstitutional. Since "due process is flexible and calls for such procedural protections as the particular situation demands," Morrissey, supra at 481, and since Congress obviously considered the Board's procedures a reasonable balance between the governmental and private interests involved, that view is entitled to "a strong presumption of constitutionality."[6/]

Finally, even should this Court hold that the Board's practices under its prior regulations and the Act unconstitutional,[7/] plaintiff is not entitled to the relief he seeks. Rather, the Court should merely order the Parole Board to hold the requested hearing.

6/ United States v. Watson, 44 U.S.L.W. 4412 (U.S. January 26, 1976).

7/ Since 18 U.S.C. § 4214 is virtually identical to 28 C.F.R. § 2.53, there is little to be gained by remanding this case to the district court for consideration in light of the new statute.

ARGUMENT

I. Due Process Does Not Require A Parole Revocation Hearing For A Parolee Convicted Of An Offense While On Parole.

As will be discussed in Section III, infra, the Parole Board currently provides -- and will provide under the new Act -- a review of the parolee's status during the intervening sentence, and a full revocation hearing at that time or at the time the parolee is taken into custody for service of the violator term.[8] However, if no such review or hearing is constitutionally required, the Board's regulations and the Act may not be challenged on Fifth Amendment grounds.[9]

---

[8] Under 28 C.F.R. §2.53, a revocation hearing conducted during the pendency of the intervening sentence is called a "dispositional interview;" under §4214(b)(3) it is referred to as a "dispositional hearing." There is no difference between these hearings and a regular revocation hearing, 18 U.S.C. §4214(d), except that under the prior regulation and §4214(b)(3), the result may be to let the detainer stand.

[9] Petitioner has not alleged that the Board failed to follow its own regulations; hence his challenge is solely to the constitutionality of those provisions.

The procedural protections of the Due Process Clause of the Fifth Amendment do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property."[10] Accordingly, in evaluating claims of right to procedural due process, it is necessary to identify the nature of the underlying substantive interests at stake in order to determine whether those interests are subsumed under either "liberty" or "property."[11]

10/ Obviously, the issue at bar does not involve the situation in which governmental action threatens to deprive an individual of his life.

11/ It is precisely this specific nature of the Fifth Amendment inquiry which leads us to disagree with Judge McGowan's due process analysis in Jones v. Johnston, supra, at 9-14. While recognizing the difference between Fifth Amendment due process and Sixth Amendment speedy trial claims, the court -- erroneously we believe -- incorporates the specific Sixth Amendment protections into the more general contours of the Due Process Clause, Id., at 12.

with detainers, and full dispositional interviews for those who can

Perhaps the paradigm is Board of Regents v. Roth, 408 U.S. 564 (1972). Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the non-renewal. The Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of the due process question:

> [T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

408 U.S. at 570-71 (emphasis in original). The Court then determined that Roth's interest in continued employment, i.e., his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The Roth decision illustrates that although "grievous loss" may be a necessary prerequisite to the invocation of due process protections, it is not a sufficient one: the substantiality of

intervening felony conviction seems certain to result in revocation

an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a parolee's interest in having his parole status determined as soon as possible may be viewed as substantial cannot be dispositive of the due process claim in this case. To the contrary, as Roth demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also Arnett v. Kennedy, 416 U.S. 134 (1974); Goss v. Lopez, 419 U.S. 565, 572-576 (1975). As the Roth Court noted:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. at 577.

A "legitimate claim of entitlement" exists only when the government has bound itself, either by statute, regulation, rule, or course of practice to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in Goss v. Lopez, supra, the student had a statutory right to attend school unless he was guilty of misconduct; in Arnett v.

2 The interest of the Parole Board -- To comply with

Kennedy, supra, the employee could be terminated only for cause; in Perry v. Sindermann, 408 U.S. 593 (1972), the teacher asserted a well-settled practice of reemployment absent "sufficient cause." Where a government -- state or federal -- has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. Richardson v. Perales, 402 U.S. 389, 401-402 (1971).

On the other hand, where the state has not so bound itself, there can be no legitimate claim of entitlement. In Roth, for example, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 866 (1961). When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in Arnett v. Kennedy, supra, at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided . . .no conditions at all, . . .no hearing is required. 12/

12/ We acknowledge that this Court has rejected an argument similar to the one we have made here, holding that it "attempts to resurrect the now-discredited right-privilege dichotomy as an analytical approach to due process . . . ." Cardaropoli v. Norton, 523 F. 2d 990, 995, n. 11. We submit that this characterization misconceives the thrust of our argument.

Under the right-privilege distinction, benefits created by substantive constitutional guarantees were "rights," and those created by statute were "privileges" subject to unfettered governmental control. A state or federal agency could defend a claim that it had denied due process of law by answering that, because it was not constitutionally required to give the benefit in question to anyone, plaintiff could not complain that he had not received it, no matter how arbitrary the decision and no matter what sort of discrimination may have been practiced. Thus even entitlements founded on statutory guarantees were not enforceable in practice.

The question whether there is a "liberty" or "property" interest -- an inquiry established by the Constitution itself -- is quite different. The Court held in Roth that "property" interests are founded only upon statutes, rules, or settled course of practice. The question in a case of this sort, therefore, is whether any statute, rule, or practice has created for the prisoner a legitimate claim of entitlement contingent upon specific facts. If it has done so, the Due Process Clause applies even though the entitlement may be a "privilege" that could be revoked at any time by altering the rules that created the entitlement. For example, one deprived of welfare is protected by the Due Process Clause. Goldberg v. Kelley, 397 U.S. 254 (1970). And if a law provides that any individual who is "unemployed" shall be entitled to receive unemployment conpensation, the expectation of benefits would be a property interest because benefits would be contingent upon provable facts. An applicant for unemployment benefits therefore would be entitled to due process of law. Cf. Richardson v. Perales, supra, at 401-402 (application for Social Security benefits).
(continued)

In the instant case, petitioner asserts that the Parole Board has caused a detainer to be lodged against him without the protection of a full revocation hearing. As a result of this detainer, Shepard argues, he is denied the opportunity of having his sentences run concurrently, is denied privileges while in the New York institution, and may be harmed in his efforts to defend against the charges for which he may ultimately be revoked. Br. at 3, 18-26. We submit that none of these factors

---

(continued)

Under our argument, the applicability of the Due Process Clause turns not upon the source of the law or regulation creating a claim of entitlement, or upon the label attached to that claim, but upon whether there is a legitimate claim of entitlement -- that is, whether any rule of law provides that specific facts entitle a parolee convicted of a second offense not to be revoked. The right-privilege dichotomy depended upon the source of the rule in question; the inquiry into liberty or property looks to the nature of the entitlement created, and to whether there is a rule of entitlement at all.

creates a liberty or property interest protected by the Fifth Amendment.

As noted earlier, a parolee's felony conviction while on parole conclusively establishes that he has violated the terms of his parole, and no set of facts could entitle him not to be revoked.[13] All that remains is a dispositional decision reserved to the Board's discretion. While the Court in Morrissey indicated that hearings are often useful in providing information helpful to parole authorities in exercising their discretion, Id., at 480, 483-84, the Court did not hold that parolee must be accorded a hearing solely to determine whether -- or how -- parole authorities should exercise their discretion once the violation has been found.[14] In fact the Supreme Court in Morrissey specifically stated that the need for a revocation hearing is obviated when the fact of parole violation has been conclusively established by an admission. 408 U.S. at 490.

13/ Thus, this situation is totally different from that in Morrissey, supra, or in Wolff v. McDonnell, 418 U.S. 539 (1974).

In those cases, the parolee or prisoner could prove a set of facts; i.e., that he did not commit the charged violation, which would conclusively entitle him not to have adverse action taken against him. In contrast, petitioner's sole interest herein is to have the Board exercise its discretion favorably.

14/ Indeed, the Board could revoke the parole of all parolees convicted of offenses, and simply use mitigation as a factor in considering when to reparole.

Thus, we dispute petitioner's contention that "due process applies to the entire proceeding," Br. at 17, and submit that the Court's language cited above was not a mandate to hold hearings when the fact of the revocation was already established, but rather merely an observation concerning the advantages of adducing such information at hearings that were required because of existing factual dispute.

The specific interests articulated by petitioner are also insufficient to invoke the protection of the Due Process Clause. First, since the Board retains the discretion to grant or refuse concurrency of sentence even after a hearing, Zerbst v. Kidwell, 304 U.S. 359 (1938), petitioner may not claim an interest based upon the possibility of a concurrent sentence. Next, if petitioner is subject to closer custody and is denied privileges because of the detainer,[15/] then his remedy is against the New York prison authorities denying him those privileges, Cf. Cooper v. Lockhart, 489 F. 2d 308 (8th Cir. 1973),

---

15/ Obviously, it is the presence of a detainer whose ultimate effect is as yet unestablished that causes petitioner to complain, since if a hearing were held and parole revoked, the same detainer would remain. In any case, a detainer based upon an as-yet-untried indictment bears little resemblance to the one presently lodged. A better analogy -- and one that points up the illusory quality of petitioner's claim -- would be to a detainer based upon a convicted but yet unsentenced individual. Such an inmate could scarcely claim that he had been denied due process.

not federal parole authorities.[16] Finally, Shepard's contention that he will be unable to adequately defend at the future hearing relates solely to the Board's discretion and therefore cannot create a legitimate interest.

In short, any "interests" claimed by petitioner are merely unilateral expectations on his part as to what might happen if a hearing were provided now. In none of them does he have a legitimate claim of entitlement meriting the protection of the Due Process Clause.

16/ If Roth had subsequently been denied benefits by some other group (e.g., an employment compensation program or health plan, an academic organization) because of his dismissal, surely that "disability" would not then have entitled him to the hearing before Wisconsin University authorities that had been denied him.

II. Assuming Arguendo that Petitioner Is Entitled To A Hearing Before Parole Is Revoked, That Hearing May Be Deferred Until Petitioner Begins Service Of The Violator Term.

Even if a hearing must be provided at some point, it does not follow that it must be held promptly after the issuance of the violator warrant (as the Eighth Circuit held in Cleveland), after the conviction for the intervening crime (as the Seventh Circuit held in Hahn), or upon demand (as the District of Columbia Circuit held in Jones."[17/] Rather, the hearing may await the completion of the intervening sentence and the return of the parolee to federal custody.[18/]

17/ In Section III, infra, we will consider whether the review provided under 28 C.F.R. §2.53 and 18 U.S.C. 4214(b) is sufficient to satisfy due process requirements, if there are any, during the pendency of the intervening sentence. For purpose of this section, however, only the sufficiency of the full revocation hearing -- provided at the time the inmate is taken into custody -- will be discussed.

18/ In Jones, supra, at 30, Judge McGowan assumes "that a hearing has to be held sufficiently before the expiration of the intervening sentence to eliminate the risk of unjustified incarceration." Id., at 12-14. Once over that hurdle, it is a simple matter to decide -- as did the Jones court -- that the Board has little administrative interest in not providing the hearing sooner.

That this assumption is contrary to Morrissey is clear from the Supreme Court's holding there that a delay of two months' duration between incarceration and hearing would be reasonable. Morrissey, supra, at 488.

It should be noted that the government does not contend that petitioner is not "in custody" for the purpose of habeas corpus jurisdiction. 28 U.S.C. §2241(c)(3); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). We do contend, however, that petitioner has not been "retaken" within the meaning of 18 U.S.C. §4207 [19] or §4214(d) until such time as he is delivered into custody for commencement of service of the violator terms. Hence, no statutory impediment blocks the Board's practice of delaying the hearing until the later time. And, since unlike Morrissey, the petitioner herein is neither deprived of liberty in the common sense (since he is incarcerated for the intervening offense) nor any cognizable liberty or property interest because of the detainer (see Section I, supra), his Fifth Amendment right to a hearing accrues, if at all, at the time he begins service of the violator term.

19/ 18 U.S.C. §4207, not included in the new Act, provided that:

> A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board . . . .

In his brief, petitioner contends that the "refusal of the Board to give a parole violation hearing at a time when it can exercise the full range of its discretion . . . . deprives the parolee of an opportunity to obtain the extent of concurrency which he is entitled to receive and which is appropriate in his case." Br. at 24. Such argument is not only conclusory, but also misperceives the proper nature of due process inquiry.[20/] Similarly, the cases cited for the proposition that the "denial of a prompt proceeding resulting in loss of opportunity to receive a disposition permitted under the rules is a violation of the Constitution," Br. at 25, all concern criminal trials and the specific provisions of the Sixth Amendment; hence, they are inapposite here.

Since no liberty or property interest -- nor any prejudice thereto -- can accrue prior to the time a parolee is retaken for service of the violator term, the Board's practice of delaying the revocation hearing in appropriate cases comports with the requirements of the Due Process Clause.

20/ Indeed, petitioner repeats throughout his brief that he has missed an opportunity for concurrency. As noted earlier, under both prior law and the Act, the holding or delaying of a hearing has no bearing upon concurrency of service of sentence. In any event, petitioner's "claim" to whatever concurrency he was entitled to can scarcely create a substantive right to concurrent time. Since petitioner has no protected liberty or property interest in receiving concurrent sentences, the "opportunity" he may miss is of no constitutional import.

III. Assuming Arguendo That Petitioner Is Entitled To Due Process Safeguards During The Pendency Of His Intervening Sentence, The Board's Practices Adequately Protect His Interests.

Evaluation of the Parole Board's practices, both under 28 C.F.R. § 2.53 and § 4214(b), is of primary import here. [21/] Not only is this the first opportunity for a court to review the new Act, but since its constitutionality is at issue, consideration of its provisions is particularly important. In discussing § 4214(b), it should also be remembered that it operates in tandem with the full hearing provisions of § 4214(d); thus the requirements of the Due Process Clause must be compared against the Board's practices in their entirety. We believe that any such comparison will demonstrate that these procedures provide adequate procedural safeguards.

[21/] As noted earlier, § 4214(b) codifies the administrative regulations now appearing in § 2.53. The only differences are that: (1) under § 4214, every detainer is reviewed within 180 days of the time it is placed, versus a maximum of one year under the old regulations; (2) under § 4214(b) the parolee is informed not only that he may communicate with the Board relative to disposition of the warrant, but is also advised of when the review occurs, so that he may insure that any information he transmits by way of written application will be received in a timely fashion; and (3) the parolee may now have counsel provided to aid him in the preparation of that application.

For purposes of this discussion, we will refer to the procedures as set out in § 4214.

Petitoner argues that the Board's procedures "do not comply with Morrissey or due process." Br. at 12-15. While conceding that he knew of his right to communicate with the Board, knew that he could inform it of any information that he or others might have in mitigation or otherwise, and knew that the detainer would be reviewed periodically, petitioner effectively ignored this avenue and demanded a full revocation hearing. Br. at 12-13. In petitioner's view, only a full-scale hearing during his intervening sentence will satisfy Morrissey and the requirements of due process.

Various Supreme Court decisions, however, -- including Morrissey -- make clear that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Restaurant Workers, supra, 367 U.S. at 895. Rather, it entails a balancing process, whereby the legitimate interests of both the private party and the government are weighed to determine what procedural protections are necessary.

Most recently, in Matthews v. Eldridge, 44 U.S.L.W. 4224 (U.S. February 24, 1976), the Court had occasion to engage in this balancing process in the context of an individual whose disability benefits were to be terminated based upon written reports. The recipient contended that the termination procedures violated due process and that he had a right to a pre-termination hearing. In rejecting this claim, the Court first noted that:

> ... resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are

> affected. Arnett v. Kennedy, supra, at 167-168 (Powell, J., concurring); Goldberg v. Kelley, supra, at 263-266; Cafeteria & Restaurant Workers Local 473 v. McElroy, supra, at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelley, supra, at 263-271.

44 U.S.L.W. at 4429.

The Eldridge Court then traced the administrative procedures available to the recipient, and held that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." Id., at 4231.

It is thus clear that due process does not inevitably require an in-person evidentiary hearing, and that contrary to petitioner's assertion, a review procedure can fully satisfy Fifth Amendment requirements. 22/ We submit that the procedures embodied in 18 U.S.C. § 4214(b), which include a timely review for all parolees

---

22/ In its opinion in Jones, the District of Columbia Circuit totally neglects the Board's procedures; rather, the court there views the comparison as between an early in-person hearing and a delayed in-person hearing. Thus, little reliance can be placed upon that decision.

with detainers, and full dispositional interviews for those who can demonstrate the need for an immediate hearing, strike a proper balance between the legitimate interests of the parolee and those of the Board.

1. The interest of the parolee -- A parolee may have an interest in presenting evidence in mitigation to support his claim that despite his violation, he should not be revoked. [23/] Although in some cases such factors may exist, it is unrealistic to suggest that many parolees convicted and sentenced to prison for criminal offenses while on parole will be able to advance reasons sufficient to justify continuation of their parole status. [24/] Rather, the stark reality of an

---

[23/] Petitioner herein has not articulated any evidence in mitigation that he would present to the Board if granted a hearing. In any case, the parolee's interest in an early revocation hearing is diminished by the fact that many of the dispositional factors considered by the Board relate to events far more remote in time than the charged parole violation; e.g., prior record, educational and employment history, etc. Petitioner could hardly argue that he is entitled to a revocation hearing within a few months of all such events considered in the Board's dispositional decision.

[24/] Since this issue only arises in the context of an individual serving an intervening sentence of some length, we are not faced with a parolee convicted of a petty offense. In that case, the short duration of the intervening sentence would mean that a revocation hearing could be conducted fairly soon after the violation.

intervening felony conviction seems certain to result in revocation, particularly if that decision must be made immediately. For those few individuals who have a valid reason for wishing to perpetuate their testimony or that of others, believe they have a valid explanation for their action, or need to have the status of the detainer clarified, the provisions of the Act -- particularly as it includes counsel -- surely provide an adequate means of insuring effective review. And, if further inquiry is deemed necessary, a fuller interview is provided. Indeed, it is likely that more effective review and disposition of detainers will be possible if the Board need not expend its time and resources conducting hearings that are, in the overwhelming majority of cases, meaningless exercises. 25/

Since the other "interests" alleged by petitioner -- access to rehabilitative programs and concurrency of sentence -- are neither related to the hearing sought nor interests to which petitioner has any claim of entitlement, they do not merit greater procedural protection than is provided under the terms of the Act. 26/

25/ The case presently before the Supreme Court, Moody v. Daggett, supra, provides a vivid illustration. After being paroled from a conviction for the rape of a pregnant girl at knifepoint, Moody murdered his wife and a female acquaintance. He now contends that his parole status is unfairly jeopardized because of the delay in holding a revocation hearing.

26/ A fourth interest -- certainty of future disposition -- is cited by the Court in Jones v. Johnston, supra, at 20-22. As that court notes, however, the holding of a hearing will not indicate how long -- or even whether -- the parolee will actually serve additional time because of the violation. Hence this rationale provides little reason to require early hearings in all cases.

2. The interest of the Parole Board -- To comply with petitioner's contention for all parolees convicted of intervening offenses, it is estimated that the Board would be required to hold in excess of 800 additional revocation hearings a year in state prisons and local jails throughout the country. Since two examiners are required at every hearing, it is obvious that substantial resources would have to be devoted to this effort. [27/] The Board also has an interest in exercising its discretion in the most intelligent manner possible. In many cases, the opportunity to view a parolee's progress while in prison for the intervening charge gives the Board the chance to do so, and often results in a decision not to revoke. We do not believe that the decision as to the optimum timing of the hearing is one which the Board must delegate to the parolee. Rather, the Board should be free to conduct its hearing at the time it believes to be most beneficial.

While the situation at bar cannot be equated with that in Eldridge, we submit that the Court's analysis is crucial here.

27/ For state parole boards, whose examiners are not situated around the country, the burden of traveling to all the other states to conduct hearings would be overwhelming. The alternative -- transporting the inmate to the location of the examiners -- is even more expensive, as it requires not only the inmate's transportation expense but that of a guard or marshal as well.

Petitioner has not been deprived of liberty as was the case in Morrissey; thus his interest in an in-person hearing is concomitantly reduced. 28/ Next, unlike the situation in Morrissey, there is no disputed set of facts as to the violation of parole: hence there is substantially less value in an evidentiary hearing or oral presentation to the decision-maker. See Eldridge, supra, at 4232. 29/ Finally, as the Eldridge Court wrote:

> In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases .... The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits. No one can predict the extent of the increase .... We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

28/ In Eldridge, the Court drew a similar comparison to the recipient in Goldberg v. Kelley, supra:

> ... there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

Eldridge, supra, at 4231.

29/ Here again, the difference between this case and Morrissey is even greater than that between Eldridge and Goldberg.

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

Id. at 4233. As in Eldridge, an early in-person hearing is not required to comply with whatever due process interests petitioner possesses. Rather, the protection set out in § 4214(b) and (c) are sufficient.

IV. Even If This Court Decides That Petitioner Is Entitled To An Early In-Person Hearing, He Is Not Entitled To Have The Detainer Removed With Prejudice.

Petitioner concedes that any error in delaying a revocation hearing can be cured by the granting of a fair hearing. United States ex rel Blassingame v. Gengler, 502 F.2d 1388 (2d Cir. 1974). Nevertheless, he contends that the delay has denied him the opportunity to present mitigating evidence and to obtain concurrent sentences. Shepard concludes, therefore, that no hearing can possibly remedy the situation and that the warrant must therefore be quashed. 30/

As we have argued, the holding of a hearing does not directly relate to whether concurrent service will be granted. Hence petitioner may not claim prejudice from the delay in holding the hearing. Moreover, the type of prejudice contemplated in Blassingame was in the petitioner's diminished ability to defend at the revocation hearing, not in his being denied some collateral benefit as concurrency. Finally, petitioner is premature with respect to any claim of prejudice. Should this Court hold that an early in-person hearing is required, petitioner could return to the district court after the hearing to make whatever allegations of prejudice he then had. It would be

30/ Petitioner seeks to have the "appellant [sic] detainer withdrawn with prejudice." Br. at 33. Actually, his remedy, if granted, would be to have the warrant underlying the detainer quashed.

pure speculation to make conclusions -- or even address -- those questions now.

Even those courts that have ruled against the Board have refused to quash the warrants absent an actual showing of prejudice. Jones v. Johnston, supra, at 46, Cleveland v. Ciccone, supra, 517 F. 2d at 1089; Johnson v. Holley, 528 F. 2d 116, 119 (7th Cir. 1975). Accordingly, even if petitioner's due process claims are sustained, his remedy is to be provided the revocation hearing in question.

CONCLUSION

For the foregoing reasons, respondent urges that the judgment of the District Court for the Northern District of New York be affirmed.

Respectfully submitted,

RICHARD L. THORNBURGH
Assistant Attorney General

GEORGE W. CALHOUN
MITCHELL B. DUBICK
Attorneys, Department of Justice
Washington, D.C. 20530
202-739-2311

Attorneys for Appellee

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief for Appellee has been mailed this 26th day of April, 1976, to counsel for appellant:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, N. Y. 10007

Mitchell B. Dubick
MITCHELL B. DUBICK